

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-1422

7cc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
 UNITED STATES OF AMERICA, :
 Appellee, :
 :
 -against- :
 :
 WALTER SWIDERSKI, :
 Appellant. :
 :
 -----x

To be argued by
Richard A. Greenberg

B
p/s

Docket No. 75-1422

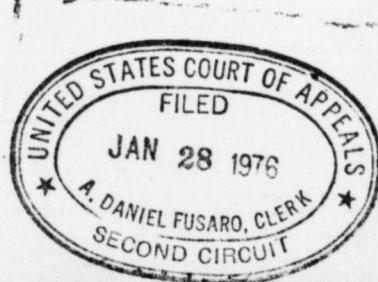
APPENDIX FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESO.
THE LEGAL AID SOCIETY
Attorney for Appellant
WALTER SWIDERSKI
FEDERAL DEFENDER SERVICES UNIT
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New York, New York 10007
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RICHARD A. GREENBERG

Of Counsel



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**CRIMINAL DOCKET
UNITED STATES DISTRICT COURT**

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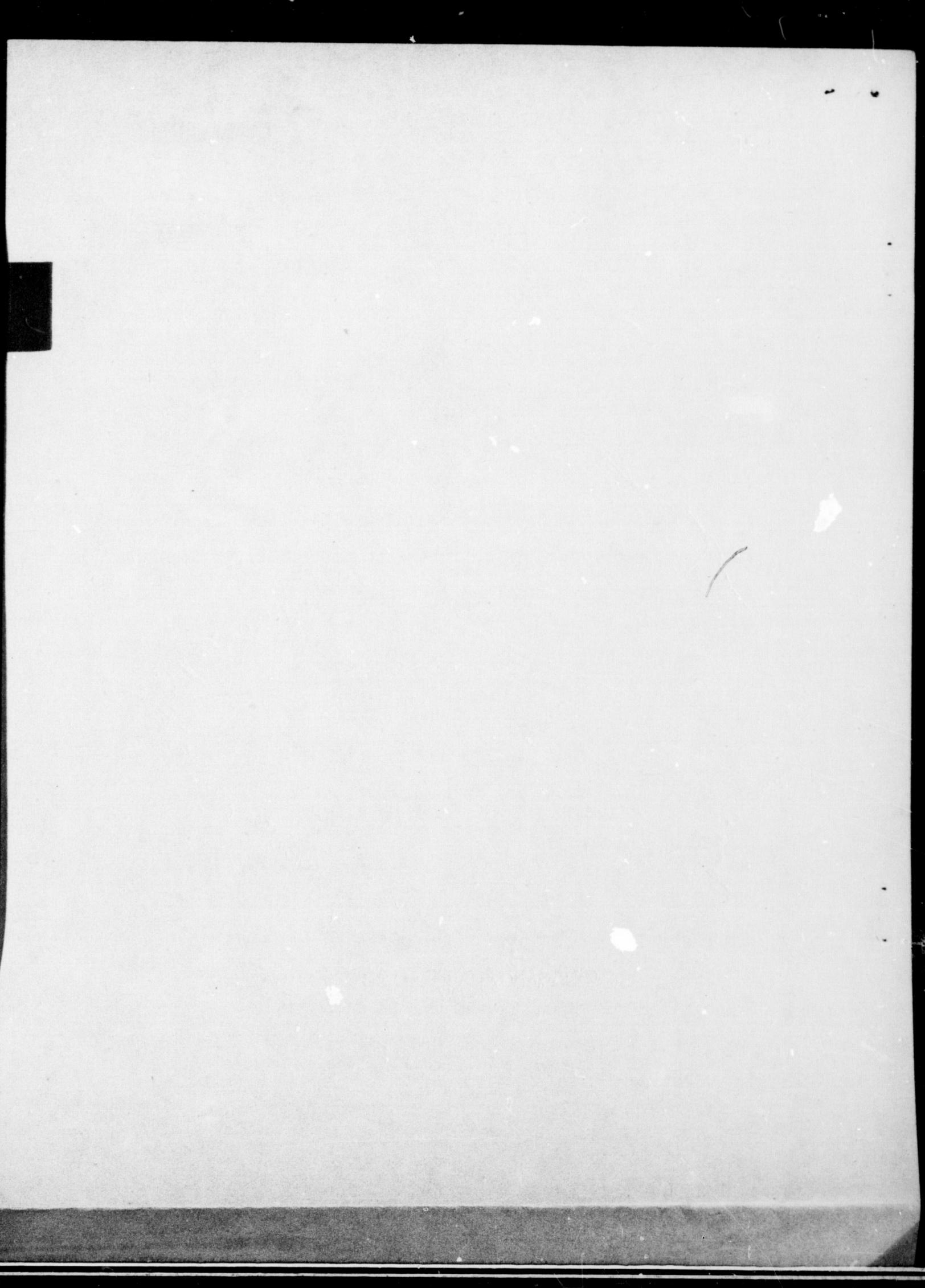
JUDGE BONSAI 75 CRIM 797.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	<i>For U. S.:</i>
vs.	
1. WALTER SWIDERSKI	Harry C. Batchelder, Sp
2. MARITZA DE LOS SANTOS	791-0071

07)	STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
	J.S. 2 mailed	Clerk					
	J.S. 3 mailed	Marshal					
	Violation	Docket fee					
	Title 21						
	Sec. 812, 841(a)(1), (b).						
	Distr. & possess. w/intent to distr.						
	Cocaine, II & Marihuan, I.						
	(Two Counts)						

DATE	PROCEEDINGS
8-8-75	Filed indictment.
8-18-75	Deft. Swiderski (atty. present) Pleads not guilty. Bail fixed in the sum of \$1,500. P.R.B. continued. De Los Santos-Court directs entry of not guilty plea. Deft. R.O.R. Case assigned to Judge Bonsal for all purposes. Owen, J.
8-16-75	Filed Govt's Voir Dire.
8-20-75	Filed Govt.'s requests to charge.
8-21-75	Filed Govt.'s memo. of law re: entrapment.
8-21-75	Jury trial begun before Judge Bonsal.
8-22-75	Trial cont'd. Motion to dismiss re: deft. Los Santos - denied. Granted as to deft. Swiderski as to count 2 - denied as to count 1.
8-23-75	Trial cont'd. and concluded. Deft. Swiderski guilty ct. 1. Deft. Los Santos guilty cts 1 & 2. Pre-sentence reports ordered. 12-8-75 set. for sent. Swiderski bail cont'd. Deft. Los Santos R.O.R.
1-17-75	Filed transcript of record of proceedings, dated Aug 21, 22, 23, 1975. Bonsal, J.

DATE	PROCEEDINGS
12-2-75	Filed Govt.'s memo. of law in opposition to counsel for Swiderski's trial memorandum.
12-8-75	WALTER SWIDERSKI (atty. present) Filed JUDGMENT - ct. 1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Cod, as amended, with provision deft. be confined in a JAIL TYPE institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs., to commence upon expiration of confinement, subject to the standing probation order of this Court. Pursuant to Sec. 841, of T. 21, U.S. Code, deft. is placed on Special Parole for a period of 3 yrs., to run concurrently with his prob. Bail pending appeal fixed in the amount of \$1,500. P.R.B. Bonsal, J. issued all copies.
12-8-75	MARITZA SWIDERSKI (atty. present) Filed JUDGMENT- ct. 1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Code, as amended, with provision deft. be confined in a JAIL type institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs. to commence upon expiration of confinement, subject to the standing probation order of this Court. Pursuant to Sec. 841 of T. 21 U.S. Code, deft. is placed on Special Parole for a period of 3 yrs. to run concurrently with her probation. Deft. cont'd. R.U.R. pending appeal. Bonsal, J. issued all copies.
12-10-75	W. Swiderski-filed P.R.B. (Unsecured) pending appeal in the sum of \$1,500.
12-12-75	W. Swiderski-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty & deft.
12-15-75	M. De Los Santos-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty. & Deft.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CRIM 797

-----x
UNITED STATES OF AMERICA :

- v - :

WALTER SWIDERSKI and
MARITZA DE LOS SANTOS,

INDICTMENT

75 Cr.

Defendants. :

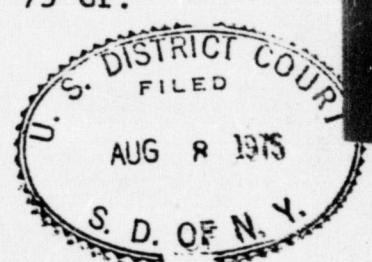
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The Grand Jury charges:

On or about the 3rd day of June, 1975, in the
Southern District of New York, WALTER SWIDERSKI and MARITZA
DE LOS SANTOS, the defendants, unlawfully, intentionally and
knowingly did possess with intent to distribute, a Schedule
II narcotic drug controlled substance, to wit, 21.5 grams of
cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1)
and 841(b)(1)(A); Title 18, United States Code,
Section 2.)

1B



SECOND COUNT

The Grand Jury further charges:

On or about the 3rd day of June, 1975, in the Southern District of New York, WALTER SWIDERSKI and MARITZA DE LOS SANTOS, the defendants, unlawfully, intentionally, and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, 7.6 grams Marihuana (Cannabis sativa L.)

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

W. M. Dove
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

MICROFILM

AUG 8 1975

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~~RECORDED BY AL 216441 SOUTHERN (520) MURKIN, MPK~~

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

WALTER SWIDERSKI, and
 MARITZA DE LOS SANTOS,

Defendants.

INDICTMENT

(21 USC §§ 812, 841(a)(1), 841(b)
 (1)(A); Title 18 USC §2.)

PAUL J. CURRAN

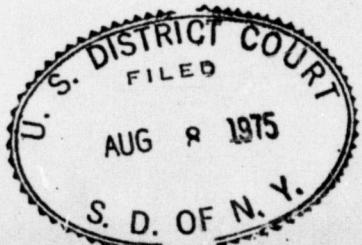
United States Attorney.

A TRUE BILL

Paul J. Curran

Foreman.

FPI-SS-2-19-71-20M-6950



JUDGE *Brennan*

AD

OCT 21 1975 *Tony ENPLANQUE TRAIL BEGUN*
 OCT 22 1975 TRIAL CONT'D BONNIE SWIDERSKI ACTION
 TO DISMISS DEFENDANT WALTER SWIDERSKI ON GROUNDS
 TO DEFENDANT SWIDERSKI AS TO CPT. DEPARTMENT OF
 BONNIE SWIDERSKI, SOUTHERN DISTRICT OF NEW YORK
 CHARGE BY THE COURT. MARITZA SWIDERSKI
 TONY ENPLANQUE DEFENDANT SWIDERSKI GOING ON
 DEFENDANT SWIDERSKI GOING ON FOR TRIAL
 PRE-TRAIL REPORT BY PSC FOR SWIDERSKI
 SWIDERSKI BONNIE SWIDERSKI, MARITZA RICOH

Swidlerski

DEC 8 1975 SENTENCE WALTER SWIDERSKI
 CITY JACK LIPSON LEGAL PLACED ON
 COMMENDED TO COSTUME CITY CENTRE
 IMPRISONMENT FOR 2 YRS. TO SERVE 6 mos. IN
 TYPE INSTITUTION EXECUTION OF SENTENCE
 SENTENCE SUSPENDED. PROBATION 3 yrs. AND
 RELEASE AT 21 S. 4208 1/4 SPECIAL RELEASE
 TO BONNIE CONCURRED WITH PROBATION OF SWIDERSKI
 RIGHT TO APPEAL BONNIE SWIDERSKI APPEAL
 DEC 8 1975 MARITZA DE LOS SANTOS HIRKA MARITZA
 SWIDERSKI CONVICTION ON CPT. DEPARTMENT OF
 SENTENCED ON TO T. 18 SEC. 13651

Julius Wasserstein (atty)
IMPRISONMENT 8 YRS. TO SERVE 6 MOS. IN A JAIL TYPE INSTITUTION
EXECUTION OF BALANCE OF SENTENCE SUSPENDED
d PROBATION 3 YR FOLLOWING RELEASE T 21 420847
SPECIAL PAROLE 3 YR TO RUN CONCURRENTLY WITH PROBATION
APPOINTED COUNSEL TO APPEAL. NO. 26136. PENDING APPEAL
APPOINTED COUNSEL TO APPEAL. NO. 26136. PENDING APPEAL
PROSECUTOR

④

USA v. 1
Swiderski &
DeLosSantos
75 Cr 797
10/23/75 3
J. Bonsal

rg:mg 1

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THE CHARGE OF THE COURT

J. Bonsal

4 THE CLERK: The Court will now charge the jury.

5 Spectators may leave at this time or remain
6 seated until the completion of the charge.

7 Will you lock the door, please, Marshal?

8 THE COURT: Madam Forelady, as you are, Mrs.

9 Marcus, by virtue of occupying the first chair, and ladies
10 and gentlemen of the jury:

11 I would like to join with the lawyers in thank-
12 ing each of you for the care and attention that you have
13 shown during this short trial and to tell you that I ap-
14 preciate the sacrifices that I know that each of you has
15 had to make in your own personal lives so you could serve
16 in this very important capacity of being on a federal
17 jury.

18 I know you will bear with me and give me the
19 same attention that you have shown throughout the trial
20 so that you may understand the principles of law which
21 apply to this case.

22 Remember I told you at the time you were selected
23 that it is the jury's duty to weigh the evidence here
24 calmly and dispassionately without any sympathy or without
25 any prejudice for or against either the Government or

2 either of these defendants.

3 I told you that everyone appearing before this
4 bar of justice is entitled to a fair and impartial trial
5 and this is regardless of his occupation or his station
6 in life.

7 I told you when you were selected that the sub-
8 ject matter here involved narcotic drugs and I mentioned
9 that and I told you that that fact must not create any
10 bias or prejudice in your minds, or prevent you from
11 rendering an absolutely fair and impartial verdict.

12 Of course, as I told you, your verdict must be
13 based solely on the testimony you heard from that witness
14 chair and on the exhibits which were received in evidence
15 and on nothing else at all.

16 Then I told you, if you will recall, that you,
17 ladies and gentlemen are the judges of the facts; that at
18 the end of the trial I would instruct you as to the law
19 and as to the law you must follow my instructions. It
20 is not what the lawyers say the law is or
21 what you may have read in another context or even what you
22 may have heard from another judge; it is the instructions
23 that I give you now.

24 Of course, as I said to you, you, the jury, are
25 the sole judges of the facts. It is not what a lawyer

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2 may say a witness testified to or what he says the docu-
3 ment contains or shows, nor what I might say on these sub-
4 jects. It is what you, the jury, remember and decide.

5 I also told you when you were selected that you
6 would observe me having conversations with one or the
7 other of the lawyers during the trial. Indeed, I did.
8 I sustained objections and I overruled them.

9 I told you to pay no attention to all this.
10 This dealt with matters of law and housekeeping and what-
11 not.

12 Above all, ladies and gentlemen, draw no infer-
13 ences from anything I may have said during this trial which
14 might lead you to believe that I favor one side or the other
15 here because, of course, I do not. That's not my pre-
16 rogative. That is yours.

17 Now, throughout this charge, ladies and gentle-
18 men, I will instruct you that you may not convict either
19 of these defendants unless and until you were satisfied
20 that the Government has proven each element comprising
21 the crime charged beyond a reasonable doubt.

22 What do we mean by beyond a reasonable doubt?
23 Well, the words, of course, do suggest the answer. It is
24 a doubt based on reason, a doubt which a reasonable man or
25 woman might entertain, but a reasonable doubt is not a

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2 fanciful doubt, it is not an imagined doubt, it is not
3 a doubt that a juror might conjure up to avoid performing
4 an unpleasant task. It is a reasonable doubt. It is a
5 doubt which arises in a juror's mind because of something
6 in the evidence or the absence of evidence in the case.
7 It is the kind of doubt which would cause a reasonable
8 man or woman in a more serious and important matter in
9 his or her life to hesitate to act.

10 The burden is on the Government to prove the
11 guilt of a defendant beyond a reasonable doubt. The
12 Government need not prove a defendant's guilt beyond all
13 possible doubt, because after all if that were the rule,
14 few people, however guilty they might be, would ever be
15 convicted.

16 In this world of ours it is practically impos-
17 sible for one to be absolutely and completely convinced of
18 any controverted fact which by its nature is not susceptible
19 to mathematical precision or to mathematical certainty.
20 So the law is that the Government must prove the guilt
21 of a defendant beyond a reasonable doubt; not beyond all
22 possible doubt.

23 Now, when I reviewed the indictment with you
24 I told you also when you were selected that the indictment
25 is merely the way by which the Government calls individuals

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2 into court who it claims had violated the law, and I
3 told you that the indictment is not evidence of the guilt
4 of a defendant and the indictment does not detract in
5 any degree from the presumption of innocence with which
6 the law surrounds a defendant until his guilt is proven.

7 This presumption of innocence remains with each
8 of these defendants throughout the trial and applies to the
9 consideration of each of the essential elements of the
10 crimes charged.

11 This presumption of innocence remains unless
12 and until the jury should find that the Government has
13 proved the guilt of the defendant beyond a reasonable
14 doubt.

15 Each of these defendants has pled not guilty
16 here and by doing so he has put in issue every material
17 element of the indictment.

18 This burden has remained on the Government
19 throughout the trial and if the Government has not proved
20 to you that the defendant is guilty beyond a reasonable
21 doubt, then, of course, it is your duty to find that de-
22 fendant not guilty.

23 There are two defendants here, Mr. Swiderski and
24 Miss De Los Santos.

25 They are charged here as two individuals and the

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2 guilt of each of them must be passed upon by you separately
3 because guilt or innocence is a personal thing and each of
4 these defendants has the right to the same consideration
5 on your part as if he or she were being tried alone.

6 Now, the indictment here has two counts in it
7 and I repeat, the indictment is merely the charge.

8 The first count charges both of the defendants
9 with possession with intent to distribute of a controlled
10 substance, namely, cocaine in this case, and the second
11 count charges Miss De Los Santos alone with possession
12 with intent to distribute of a controlled substance,
13 marijuana.

14 I mentioned to you each of these counts must be
15 considered by you separately and the first count must be
16 considered by you separately as to each of the defendants.

17 The fact that you may find the defendant guilty
18 or not guilty on one count of the indictment does not
19 control your verdict on the other.

20 Now, ladies and gentlemen, this has been a short
21 trial. The lawyers have summed up to you in some detail
22 this morning and I don't intend to review the evidence here
23 because, as I mentioned to you, it is your recollection which
24 controls.

25 What the lawyers say or what I say is not

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2 evidence.

3 I may mention briefly what I understand to be
4 some of the contentions here. I don't pretend that they
5 are complete. All I am doing this for is in the hope that
6 it may help you refresh your own recollections, which
7 is, after all, the thing that controls.

8 Now, as I understand it, the Government is con-
9 tending here that on June 3, 1975, each of the defendants,
10 Swiderski and Miss De Los Santos, possessed with intent
11 to distribute 21.5 grams of cocaine. That is count 1.

12 In count 2, the Government contends that on that
13 same day Miss De Los Santos possessed with intent to
14 distribute 7.6 grams of marijuana and that in both counts
15 this was in violation of federal law.

16 As I recall it, the Government contends that
17 Swiderski was in contact with a paid Government informer,
18 Martin Charles Davis, on or about May 31, 1975 and that
19 Davis arranged for Swiderski to meet with one fellow, I
20 think he was called Carlton Bush, who would sell the
21 cocaine to Swiderski.

22 Then on June 3, 1975, Swiderski and Miss De Los
23 Santos went with Davis and met one Carlton Bush somewhere
24 on West 48th Street, I think the apartment was, and worked
25 out the purchase of four ounces of cocaine.

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2 As I recall it the Government contends that
3 the evidence shows that both the defendants tested and
4 snorted the cocaine and then the arrangements were made
5 to purchase one ounce, I think for \$1250, and that they would
6 meet again at 6:00 p.m. to arrange the sale of an additional
7 three ounces.

8 After the meeting in the hotel, as I understand,
9 while Swiderski was driving this van, both of the
10 defendants were arrested on 34th Street and 6th Avenue,
11 I believe, and that when they were arrested the cocaine
12 and the marijuana were found in a pocketbook in the van
13 belonging to Miss De Los Santos.

14 Now, of course, each of the defendants deny
15 these Government contentions. The defendant Swiderski,
16 as I understand it, contends that if he had purchased
17 this cocaine on June 3, 1975, that he was entrapped, I
18 think was the word the lawyer used, into making this pur-
19 chase by the activity of Davis, the Government informer,
20 and that he had no intention of distributing the cocaine.

21 Miss De Los Santos denies the Government's
22 contention. I think she said she was just along, she
23 didn't know what was going on. She was in town, she had
24 some money because they were buying things at the boutique
25 show and she denies that she participated in these

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2 transactions. I think she did testify to something
3 about sniffing, that's the word, but that was for her own
4 use, that had nothing to do with the sale.

5 Now, the statute involved here, ladies and gentle-
6 men, is Section 841(a) of Title 21 of United States Code
7 which provides to the extent here relevant: It shall be
8 unlawful for any person knowingly or intentionally to
9 possess with intent to distribute a controlled substance.

10 Well, you want to ask first what is a controlled
11 substance. You heard in this case, and you heard the
12 Government chemist testify that this was cocaine and the
13 marijuana.

14 If you find that the substance here was cocaine
15 and marijuana, they are controlled substances as used in
16 the statute.

17 Now, as I mentioned to you, ladies and gentlemen,
18 the indictment contains two counts, the first one naming
19 both defendants and the second one naming only Miss De Los
20 Santos, and you will return a separate verdict with re-
21 spect to each count and with respect to each defendant.

22 The first count of the indictment reads as
23 follows:

24 "The grand jury charges:

25 "On or about the third day of June, 1975, in

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2 the Southern District of New York" -- and these events
3 you have heard about, 48th Street, the Chelsea Hotel,
4 these places you heard about were all in the Southern
5 District of New York -- "Walter Swiderski and Maritza
6 De Los Santos, the defendants, unlawfully, intentionally
7 and knowingly did possess with intent to distribute a
8 Schedule II narcotic drug controlled substance, to wit,
9 21.5 grams of cocaine hydrochloride."

10 Then count 2, which is the marijuana count,
11 reads:

12 "On or about the third day of June, 1975, in
13 the Southern District of New York, Maritza De Los Santos,
14 the defendant, unlawfully, intentionally and knowingly
15 did possess with intent to distribute a Schedule I nar-
16 cotic drug controlled substance, to wit, 7.6 grams of
17 marijuana."

18 Then it says in parentheses here something
19 which I don't understand, it says (*cannabis sativa L.*)

20 I suppose if any of you are chemists that might
21 mean something to you, but it doesn't mean anything to
22 me.

23 So you can see, ladies and gentlemen, from a
24 reading of the indictment, that the Government contends
25 that the defendants Swiderski and De Los Santos unlawfully,

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2 knowingly, and intentionally possessed on June 3rd with
3 intent to distribute the cocaine and that Miss De Los
4 Santos unlawfully, knowingly and intentionally possessed
5 with intent to distribute the marijuana.

6 Now, you recall the statute speaks about pos-
7 session with intent to distribute. What does that mean?

8 Well, the law recognizes two types of possession;
9 one we call actual possession and one we call constructive
10 possession.

11 Actual possession means if you have something
12 in your hand or something in your pocket or if you have
13 something in your purse, or if you have something in
14 your apartment, those are examples of actual possession.

15 Constructive possession means when you may not
16 have the article in your hand, but you have control of it;
17 you may have given it to somebody else for safekeeping or
18 you may know where it is and you think you have control
19 over the disposition of whatever the substance is.

20 Now turning to what "possess with intent to dis-
21 tribute" means. What does that mean? Well, intent to
22 distribute merely means that you intend at some p'nt at a
23 later time to pass all or some of it on. It could mean
24 a sale. It could mean you could give it away. You could
25 give it to a friend of yours or even to your fiancee. If

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2 you are going to do that, that is a distribution.

3 Now turning back to the indictment, ladies and
4 gentlemen, in order to convict the defendant, and I have
5 told you to consider each of them separately, in order to
6 convict the defendant you are considering, the Government
7 must prove the following elements:

8 1. That the defendant you are considering pos-
9 sessed with intent to distribute the cocaine and of course
10 in count 2 that the defendant, Miss De Los Santos, possessed
11 with intent to distribute the marijuana.

12 I have been over possession and attempt to dis-
13 tribute with you. That is the first element.

14 The second element is that the defendant you
15 are considering was acting wilfully, knowingly and unlaw-
16 fully. All that means is that the defendant you are con-
17 sidering knew what he or she was doing, knew that he or she
18 was in possession of a narcotic drug in violation of the
19 law with intent to distribute.

20 Three, that the substance possessed was cocaine in
21 count 1 and marijuana in count 2.

22 Here again you have heard the chemist's testimony
23 and I haven't heard any contradiction of that so, I think,
24 as far as I recall the evidence, the substance has been
25

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2 shown to be cocaine and marijuana.

3 Now, the Government is contending here that the
4 package containing the cocaine, which is Exhibit 3A, as I
5 recall it, was on this occasion on 48th Street purchased by
6 defendant Swiderski from Carlton Bush. As I recall, the
7 Government is contending, based on Davis' testimony, that
8 the package was turned over to Swiderski and he placed it
9 in his pants pocket.

10 The defendants deny that. I think the defend-
11 ants did, in their testimony, indicate that somebody had
12 placed Exhibit 3A in Miss De Los Santos' pocketbook, but re-
13 gardless of which of these versions is true, there seems
14 to be no doubt that the package was found at the time the
15 defendants were arrested on 34th Street and 6th Avenue.

16 Now, with regard to count 1, the cocaine count,
17 you may ask yourselves what did Miss De Los Santos have
18 to do with it, if anything?

19 Her defense is she had nothing to do with it.
20 She was just there.

21 As I recall the testimony, all of the negotiations
22 were carried on by Mr. Swiderski and you may ask yourselves
23 why is Miss De Los Santos involved at all.

24 Well, here the Government is contending that
25 Miss De Los Santos aided and abetted Swiderski in effecting

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2 the purchase and this brings into play another statute,
3 Section 2(A) of Title 18 of the United States Code which
4 provides in relevant part that whoever commits an offense
5 against the United States or aids, abets, counsels, com-
6 mands, induces or procures its commission is punishable as
7 a principal.

8 All that means is that if one helps somebody else
9 to commit a crime, that person is equally liable as an aider
10 and abettor in that crime and the Government here contends
11 that the evidence shows that at the apartment on 48th Street
12 Miss De Los Santos did aid and abet her fiance in acquiring
13 the cocaine.

14 But here before you can find Miss De Los Santos
15 guilty of aiding and abetting, the Government must prove
16 beyond a reasonable doubt that she knowingly aided, abet-
17 ted and assisted Swiderski in purchasing the cocaine.

18 Now, here it is immaterial that they were fiancees
19 and it is not enough if the Government has shown that Miss
20 De Los Santos acquiesced in what was going on. Mere pres-
21 ence there would not be sufficient to find that she was
22 aiding and abetting Swiderski.

23 Here to find Miss De Los Santos guilty you must
24 find that she knowingly and willingly participated in the
25 purchase of the cocaine; that she sought in some way to gain

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2 from her participation or that she had an interest in the
3 outcome. The interest could be financial, it could be
4 a relationship between two people, it doesn't matter what
5 the interest is; did she want to help Swiderski, and here
6 you can consider what happened.

7 I think there was evidence about the testing,
8 the bleach test and all that kind of thing that went on.
9 So consider that evidence and find out whether the Govern-
10 ment has proved beyond a reasonable doubt that Miss De Los
11 Santos did aid and abet Swiderski in the purchase of the
12 cocaine.

13 Then as far as Swiderski is concerned, you heard
14 his lawyer this morning contend that he was entrapped into
15 making this purchase by the activity of Davis, the paid
16 Government informant.

17 Now, the defense of entrapment is available to
18 Mr. Swiderski if you find that he was induced or enticed
19 to commit the crime here which he would not otherwise have
20 committed.

21 If Davis' role was to afford Swiderski the op-
22 portunity to buy cocaine, that is not entrapment. Here
23 Swiderski must establish that the idea of purchasing the
24 cocaine originated with Davis and not with him.

25 He must show that he had no previous disposition,

2 intent or purpose to possess or to distribute the cocaine;
3 that it was Davis that implanted in his mind, as an innocent
4 person, the disposition to commit the crime of purchasing
5 the cocaine.

6 In considering the defense of entrapment, ladies
7 and gentlemen, remember that the narcotics business, and I
8 think the evidence here indicates that, to a certain extent,
9 the narcotics business is one which is filled with concealment
10 and guilt, and to apprehend violators under the narcotics laws
11 the Government must employ various strategems, including the
12 use of paid informers and undercover agents.

13 You can understand that if policemen went out
14 with their badges and uniforms and said, "We are looking
15 for narcotics violators," they probably would not catch
16 anybody. So in considering whether the defendant Swiderski
17 has the defense of entrapment here, consider all of the
18 evidence offered by the Government and by him, and this
19 would include prior conversations between Swiderski and
20 Davis relative to narcotics; conversations as to price and
21 quality, evidence as to understandings to make future
22 narcotics deals. And after you have considered this evidence
23 determine whether the defendant Swiderski has established
24 here that he would not have purchased the cocaine on June 3
25 except for Davis' enticement, inducements, or blandishments,

1 rg:mg 17

2 if you will, and if you find that Swiderski has shown that,
3 ladies and gentlemen, then the Government in addition to
4 the elements I reviewed with you a minute ago must prove
5 beyond a reasonable doubt that the defendant Swiderski was
6 ready and willing to make the purchase on June 3 and that
7 Davis merely afforded him the opportunity to do so. And if
8 you find that the Government has not proved this beyond a
9 reasonable doubt, then you would find the defendant Swiderski
10 not guilty.

11 But, on the other hand, if you find that the
12 Government has proved beyond a reasonable doubt that Swiderski
13 did knowingly, wilfully and unlawfully purchase the cocaine
14 and that Davis merely gave him the opportunity to do it,
15 then you may find the defendant guilty.

16 Now, you can see from all this, ladies and gentle-
17 men, that one of the crucial elements here is the knowledge
18 and intent of the defendant you are considering.

19 You must find that the defendant you are consider-
20 ing had criminal intent to violate the narcotics laws by
21 possessing a narcotic drug with intent to distribute it.

22 How do you determine that? How do you determine
23 whether the defendant was acting wilfully, knowingly, un-
24 lawfully and indeed had this criminal intent?

25 Well, an act is done knowingly and wilfully

2 if it is done voluntarily and purposefully. An act is
3 done wilfully, knowingly and unlawfully if it is done with
4 an evil motive or purpose, such as to violate the narcotics
5 laws.

6 But an act is not done wilfully, knowingly or
7 unlawfully if it is done by mistake, carelessness or other
8 innocent reason.

9 Obviously it is impossible to prove exactly what
10 the defendant you are considering knew or what his or her
11 intentions were on these occasions, because, after all, we
12 can't look into a person's mind and see what knowledge he
13 or she has in order to determine his or her specific inten-
14 tion. But these are matters which you, the jury, can de-
15 termine after taking careful consideration of the facts and
16 circumstances brought out in the evidence.

17 The knowledge and intentions, the wilfullness, if
18 you will, may only be understood when put in context with
19 the circumstances surrounding a person's acts and the infer-
20 ences which you, the jury, find may be reasonably drawn
21 therefrom.

22 You might ask yourself whether these transactions
23 were normal or whether you think they were abnormal; whether
24 they were open or whether they were surreptitious; whether
25 you believe that the background of the defendant made it

1 rg:mg 19

2 likely or unlikely that he or she fully understood what he
3 or she was doing; whether you think the defendant had a
4 motive, whether he or she had a financial or other interest
5 in the outcome and these are the kinds of questions, ladies
6 and gentlemen -- of course, not the only ones -- which
7 you should ask yourselves in order to determine the knowl-
8 edge and intentions of the defendant you are considering.
9

10 I don't suggest any answers to these questions
11 because after all in your own daily lives you are called
12 upon to use your own common sense and experience to determine
13 from the actions or statements of others what their real
14 intentions and purposes are, and please do that here with
respect to each of these defendants.

15 Now, you will recall, I think it was Davis, tes-
16 tified that he had had prior conversations with the defendant
17 Swiderski regarding narcotics transactions and about price
18 and quality and that kind of thing.

19 Now, he is not charged with any crimes except the
20 ones that I have reviewed with you and these conversations
21 occurred before that, so you will consider this evidence as
22 to these prior conversations only in considering what you
23 find the defendant Swiderski's knowledge and intentions were
24 at the time of the transactions charged in this indictment.

25 Then another point, ladies and gentlemen, which

2 you might consider on this issue of knowledge and intent:
3 Here the Government contends that when the police officers
4 approached 34th Street and 6th Avenue, that the defendant
5 Swiderski was driving the van, banged into the police cars
6 in front and in back and the Government contends that this
7 indicated that Swiderski was trying to flee.
8

9 Swiderski denies this. He says, on the contrary,
10 I saw these people with guns and I was scared to death.
11 I thought I was being held up or something.

12 So consider the evidence here, ladies and gentle-
13 men, and if you find on the basis of the evidence that
14 Swiderski was trying to escape the police, then you may
15 consider that as circumstantial evidence from which you
16 may infer-- you don't have to, but you may infer that the
17 defendant knew that he was in trouble because of narcotics.
18 In other words, consciousness of guilt.

19 But of course this evidence about the banging
20 of the cars you can consider only with respect to Mr.
21 Swiderski and not with respect to Miss De Los Santos.

22 The law recognizes two types of evidence, ladies
23 and gentlemen: direct evidence and circumstantial evidence.

24 Direct evidence is the kind of thing you hear from
25 that witness, where a witness tells you what he observed,
what he did.

2 Circumstantial evidence consists of circumstances
3 from which the jury may infer by a process of reasoning
4 certain facts which are sought to be established as true.
5 For example, circumstantial evidence is when you go home
6 on a rainy day and you go in your apartment, somebody is
7 looking at the television and they look at your hat and
8 coat and they say, "Gee, it is raining outside."

9 Well, they haven't looked outside, they have
10 looked at you and they say, "Your coat and hat are wet" and by
11 a process of reasoning they figure it is raining outside.
12 There's circumstantial evidence in this case, too, that you
13 have heard about.

14 Both direct and circumstantial evidence are good
15 evidence and no greater degree of weight is required whether
16 it is circumstantial or direct. But in any event, based on
17 all the evidence, you must be convinced beyond a reasonable
18 doubt of the guilt of the defendant you are considering.

19 Of course, different inferences may be drawn
20 from the evidence, whether it is direct or circumstantial.
21 The banging up of the police cars is a case in point. That's
22 circumstantial evidence. Here the Government asks
23 you to infer flight, running away. The defendant
24 asks you to infer no, he was just being scared to death, he
25 thought he was being attacked. But it is for you, the jury,

1 rg:mg 22

2 alone, to determine what inferences you draw from the evi-
3 dence and what facts you find to have been proven.

4 During the trial, ladies and gentlemen, and I
5 want you to remember this. I have told you to compartmental-
6 ize the defendants here and consider them separately. Con-
7 sider also only the evidence that you recall relating to
8 that defendant, not evidence that might have affected the
9 other defendant.

10 I mention this because again all of these Davis
11 conersations and telephone calls and activities with
12 Swiderski prior to June 3, that kind of evidence, Swiderski
13 is the only one involved. I think Miss De Los Santos' only
14 connection is that she might have been at some of the meet-
15 ings with him, but you are to consider that evidence of
16 these considerations and negotiations, if any, that took
17 place only with respect to Mr. Swiderski, not with respect
18 to Miss De Los Santos.

19 There may have been other instances during the
20 trial -- and the point I am trying to make is you don't
21 have any spill-over between the evidence with respect to
22 one defendant spilling over on the other defendant where
23 the other defendant was not involved.

24 Now, you, the jury, of course, are the exclusive
25 judges of the credibility of the witnesses who appeared

1 rg:mg 23

2 before you. I observed you giving them all careful at-
3 tention.

4 You will subject the testimony of all of these
5 witnesses to the same standards, whether they were Govern-
6 ment witnesses or defense witnesses.

7 Of course, it isn't the number of witnesses. It
8 is the quality of the testimony, the testimony that you, the
9 jury, think most likely represented the true picture of
10 what happened.

11 How do you determine the credibility of these
12 witnesses?

13 Well, you saw them. How did they impress you?
14 Did you think they were testifying frankly, candidly and
15 fairly?

16 So here again, ladies and gentlemen, apply your
17 common sense and experience just as you do in determining
18 an important matter in your own lives when you are called
19 upon to decide whether you had been given a true picture
20 of a given situation.

21 I think you would consider a witness' demeanor,
22 you would take into account the witness' background, oc-
23 cupation or business, you consider a witness' candor or
24 lack of it, the witness' possible bias, his or her means of
25 information and the accuracy of the witness' recollection.

1 rg:mg 24

2 And you consider whether you find the witness' testimony
3 supported or whether you find it contradicted by other tes-
4 timony which you find to be credible or by other circum-
5 stances. You consider whether a witness has an interest
6 in the case.

7 Now, as I recall it, we had a couple of New York
8 Policemen testify in here and they are law enforcement of-
9 ficers. They have an interest as such in prosecuting
10 people whom they believe to have violated the law.
11 That's an interest that you can consider.

12 Now, each of the defendants testified here. They
13 testified voluntarily. They didn't have to testify. They
14 did that voluntarily. Obviously they have an extremely
15 important interest here in testifying and that is a factor,
16 their interest you may consider.

17 Of course, this doesn't mean that a witness will
18 falsify or shade his testimony because he has an interest,
19 it was merely a factor for you, the jury, to consider in
20 determining the witness' credibility.

21 A witness may be discredited if you find that he
22 made statements at other times which are inconsistent with
23 his present testimony. He may be discredited if you
24 make up your mind the witness is lying or misleading you and
25 if you find that a witness lied or was misleading you, you

1 rg:mg 25

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2 reject all of that witness' testimony if you want, or, if
3 you find part of it reliable, you can accept that part of it
4 and reject the rest.

5 You will have the right to see any of the exhibits
6 which have been received in evidence. If you desire to
7 see them just let the marshal know.

8 As you deliberate, ladies and gentlemen, just
9 remember that a jury deliberation is one in which everybody
10 expresses their views and exchanges views.

11 Please don't be afraid to change your original
12 view if after talking to your fellow jurors you become con-
13 vinced that your original view is wrong.

14 But, on the other hand, ladies and gentlemen,
15 never surrender your honest conviction in the case. If
16 you have a honest conviction, never surrender that because
17 you are outvoted.

18 You will seek to arrive at a verdict here providing
19 that you can do so consistently with the conscientious con-
20 victions of each and every one of you.

21 Now, it is obviously extremely important here to
22 both the Government and to each of the defendants that this
23 case be decided by you. This being a criminal case your verdict
24 must be a unanimous verdict, a verdict reflecting the conscientious
25

1 rg:mg 26

2 convictions of all twelve of you.

3 If after reviewing the evidence, ladies and
4 gentlemen, you find that the defendant you are considering
5 is not guilty, you must not hesitate for any reason to
6 return a verdict of not guilty; but, if on the other hand,
7 you find that the law has been violated by the defendant
8 you are considering, you must not hesitate to render a
9 verdict of guilty because of sympathy or any other reason
10 at all.

11 Please don't consider the possibility of punish-
12 ment in case you find a defendant guilty. This rests with
13 the Court. It is of no concern of yours and must not
14 enter into your deliberations in any way. You must not
15 allow consideration of the possibility of punishment to
16 affect you or make you seek to avoid the performance of an
17 unpleasant task.

18 Finally, ladies and gentlemen, I am sure that if
19 you listen to the views of your fellow jurors and if you
20 apply your common sense here that you will reach a fair
21 verdict and I remind you that that verdict must be rendered
22 without fear, without favor, without prejudice and without
23 sympathy.

24 Will the attorneys come forward a minute, please?

25 (At the side bar)

1 rg:mg 27

2 THE COURT: All right.

3 MR. LIPSON: Your Honor, I have several objec-
4 tions which I would like to note for the record.

5 I object to your Honor's use of the example of
6 fiance in the description of a person on whom an intent
7 might be made.

8 THE COURT: I couldn't get away from the evidence
9 on that.

10 What's next?

11 MR. LIPSON: Your Honor, I think in discussing
12 entrapment I think you placed too heavy a burden on the de-
13 fendant.

14 THE COURT: You have an exception on that, too.

15 MR. LIPSON: I also object to your Honor's state-
16 ment that in order to show predisposition the Government must
17 merely show that he had a prior intent to possess or dis-
18 tribute. I think the Government would have to show a prior
19 intent to possess with the intention of distributing.

20 THE COURT: I will give you an exception on that.

21 MR. LIPSON: Your Honor made reference to the prior
22 conversations between the defendant Swiderski and Marty Davis
23 upon which the Government is relying to establish predisposi-
24 tion.

25 I think your Honor gave a weighted presentation

1 rg:mg 28

2 with respect to that and I object to it.

3 THE COURT: I am sure you think so but you have
4 an exception on that.

5 I tried to be fair to you.

6 MR. LIPSON: With respect to the question of the
7 attempted escape, the issue before the jury is not whether
8 he was trying to escape, but whether he knew that the
9 people from whom he was escaping were police officers.

10 THE COURT: Oh, no, you have an exception on
11 that, too. Your point is purely one of credibility.

12 All right.

13 MR. LIPSON: I also object to your Honor's citing
14 as an example of circumstantial evidence the alleged es-
15 cape. I think in the context of the case it is weighted
16 in the Government's favor.

17 THE COURT: All right.

18 MR. LIPSON: I also object to your Honor's refer-
19 ence to phone conversations and negotiations.

20 I think the term you used was between Marty Davis
21 and the defendant Walter Swiderski.

22 THE COURT: All right, you have an exception
23 on that.

24 What do you have?

25 MR. WASSERSTEIN: Yes, your Honor. Exception to

2 your Honor's mention in recalling part of the facts with
3 respect to Maritza De Los Santos, you mentioned she might
4 have attended some of the meetings.

5 I think the evidence will reflect --

6 THE COURT: Their recollection controls on that.

7 MR. WASSERSTEIN: I think the evidence shows that
8 she attended none of the meetings.

9 THE COURT: I said their recollection controls.

10 MR. WASSERSTEIN: I would join in all of the ex-
11 ceptions that my colleague took and make particular mention
12 of the term of "fiancee" with respect to any distribution.

13 THE COURT: You fellows used that. It started
14 out girl friend and you fellows told me fiancee was more
15 delicate so I followed you.

16 MR. WASSERSTEIN: Your Honor, I would also ex-
17 cept to your Honor's failure to include in the charge some
18 sort or corrective language on the question of threats.

19 THE COURT: We discussed that yesterday and I
20 thought and still think it was best not to discuss threats
21 because I think at this point --

22 MR. WASSERSTEIN: Could I ask your Honor whether
23 you would consider two brief additions? One is that the
24 informer per se is an interested witness and the other is
25 that prior to the application of 2A, the aiding and abetting,

2 your Honor's mention in recalling part of the facts with
3 respect to Maritza De Los Santos, you mentioned she might
4 have attended some of the meetings.

5 I think the evidence will reflect --

6 THE COURT: Their recollection controls on that.

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8 she attended none of the meetings.

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18 sort or corrective language on the question of threats.

19 THE COURT: We discussed that yesterday and I
20 thought and still think it was best not to discuss threats
21 because I think at this point --

22 MR. WASSERSTEIN: Could I ask your Honor whether
23 you would consider two brief additions? One is that the
24 informer per se is an interested witness and the other is
25 that prior to the application of 2A, the aiding and abetting,

1 rg:mg 30

2 the jury must first find that a crime in fact has been com-
3 mitted.

4 THE COURT: In what section?

5 MR. WASSERSTEIN: Before 2A, aiding and abetting
6 comes into play, the jury must first find that a crime has
7 been committed before they can consider aiding and abetting.

8 MR. BATCHELDER: That is not true, your Honor.

9 THE COURT: I will tell them about an interested
10 witness.

11 Have you anything?

12 MR. BATCHELDER: I object to the interested wit-
13 ness. There is no showing. You covered it generally.

14 MR. LIPSON: Your Honor, may I join in my col-
15 league's exceptions?

16 THE COURT: Yes.

17 (In open court)

18 THE COURT: Ladies and gentlemen, remember I
19 told you you would consider the interest a person might have
20 and I referred to the witnesses and to the defendants.

21 But it occurred to me you might also think about whether
22 Mr. Davis had an interest in testifying so I just add that
23 to the others whose interest you might consider.

24 Your verdict here, of course, on the first count,
25 you will consider each of the defendants separately,

1 rg:mg 31

2 Mr. Swiderski and Miss De Los Santos, and you will reach
3 a verdict of guilty or not guilty as to each of them, and
4 on the second count, you will reach a verdict of guilty
5 or not guilty only with respect to Miss De Los Santos.

6 All right.

7 (Alternate jurors excused)

8 (Marshal was duly sworn)

9 THE COURT: All right, ladies and gentlemen,
10 you may retire and I hope your lunches arrive soon if they
11 haven't already arrived.

12 Thank you very much.

13 (At 12:40 p.m., the jury adjourned to the jury
14 room to deliberate upon their verdict)

15 THE COURT: Gentlemen, I think if we get back by
16 a quarter of two, that will be all right.

17 (Luncheon recess)

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Request No. 1

TESTIMONY OF INFORMER

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

Devitt and Blackmar, Federal Jury Practice and Instructions §12.02 (1970)

ENTRAPMENT

The defendants also advance the defense of entrapment, which I shall presently define.

If in fact they were entrapped, which the government denies, it is a defense to the crimes charged.

Whether or not they were entrapped is a fact issue to be decided by you upon all the evidence in the case.

The function of law enforcement is not only the prevention of crime, but also the detection and apprehension of those who violate the law.

Law enforcement officials, in their efforts to enforce the laws and to detect wrongdoers, may resort to traps, decoys and deception.

The law recognizes that artifice, strategem and stealth are necessary weapons to apprehend those engaged in, or who are about to engage in, illegal activities.

Thus, the fact that government agents merely afford favorable opportunities to a defendant for the commission of an offense does not constitute entrapment.

However, in their efforts to enforce laws, government officials or their agents, may not entrap an innocent person, who, except for the government's inducement, would not have engaged in the criminal conduct charged.

Request No. 5 (cont.)

Entrapment occurs when the criminal conduct was the product of the creative activity of law enforcement agents -- that is -- if they initiate, incite, induce, persuade, or lure a person to commit an offense which otherwise he would not commit in order that the defendant may be arrested and prosecuted.

And if that occurs, the government may not avail itself of the fruits of such instigating or inducing activities.

The defendants contend that they were induced to engage in the purchase of the 21 grams of cocaine involved in count 2 by the government informer Marty Davis. They contend that, but for his inducement and pressure they would not have purchased the cocaine.

The government denies there was any entrapment and contends that the defendant's were merely afforded the opportunity to commit the offense, which they were prepared to do on their own, and that they readily and willingly did so.

To raise the defense of entrapment, a defendant must adduce some evidence that the government officer or agent induced him to commit the offense, that is, that the government agent or officer or persons working for them solicited, proposed, initiated, broached, or suggested the commission of the offense charged.

The defendants has offered such proof through their

Request No. 5 (cont.)

testimony.

If you find that the defendant has adduced some such evidence, then the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped -- that he did not need any persuasion; in short, that he was ready and willing, without persuasion, to commit the offense whenever the opportunity offered.

To sustain its rebuttal of the defense, the government must satisfy you beyond a reasonable doubt that its agents did not seduce an innocent man, but that the transaction which the defendant engaged in that resulted from the government's action was another instance of the kind of conduct that the defendants were prepared to engage in, if given the opportunity.

The proof of this may be by evidence of similar or related offenses or conduct occurring in the past, or at or about the time charged in the indictment.

The central issue is whether the defendants activities in connection with the cocaine charge contained in this indictment were caused by the urging and inducing of the government informer or whether the informer simply afforded them the opportunity to commit the crime.

If you find that the defendants were induced to commit the crime charged by the acts and conduct of the government informer, they should be acquitted.

Request No. 5 (cont.)

On the other hand, if the government has proved beyond a reasonable doubt they were ready and willing to commit the crime and were simply afforded the opportunity to do so, then the defense of entrapment fails.

Adapted from charge of the Hon. Edward Weinfeld in
United States v Kenna, 71 Cr.226

Request No. 6

CREATIVE ACTIVITY

Now, there is another defense available to the defendants, but it is available only if you find that the facts substantiate the principle of law which I am about to give you.

You have heard the term "creative activity" and "overreading governmental participation"...

As you will recall the evidence regarding the Government's participation in this case focused to a great extent on the activities of Martin Davis, who was a paid government informant and who has testified here.

Each of the defendant's contend that, with respect to the charge contained in Count one, Martin Davis overstepped the bounds of permissible law enforcement techniques by implanting in their minds the idea to purchase cocaine, by introducing them to sellers of cocaine to which they had no access by themselves, and by inciting, inducing and in fact, pressuring them to purchase the cocaine involved in count one of this indictment. The Government denies these contentions. Before you consider this defense, you, as the judges of the facts, must determine what role Mr. Davis played in this case.

The evidence varies at several points, and the inferences that you may or may not draw could vary on certain points, as to what actually happened. Only you as jurors can resolve the factual disputes as to what occurred in May and June of

Request No. 6 (cont.)

this year. Then you must determine whether these acts, as you find them, reach an intolerable degree of overreaching governmental participation. In order to sustain this defense, you must find that the activities of the government informer, Martin Davis have been intolerable and have gone beyond the limits of permissible law enforcement techniques that I have just discussed in giving you the charge of entrapment.

That is to say, if you find the overreaching participation by the government informer in the activities as you have heard them here was so fundamentally unfair as to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you must acquit each defendant, to whom this defense applies.

Furthermore, under this particular defense, you need not consider the predisposition of any defendant; because if the governmental activities reached the point that I have just defined in your own minds, then the predisposition of any defendant would not matter.

Adapted from charge of the Hon. Clarkson Fisher, USDJ
(D. N.J.) United States v Buckalew, Cr. #602-71.
(May 1973)

Respectfully submitted,

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M-979

REQUEST NO. 7

Entrapment (If Applicable)

The defendants asserts the defense of entrapment. The defense of entrapment is based upon the policy that law enforcement agencies cannot manufacture crime. They cannot tempt innocent people into committing a crime in order to prosecute them. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement agencies often use undercover investigations and informants in attempting to enforce law. Such methods are not in any way forbidden by law. Stealth and strategy are often necessary weapons in the detection and prosecution of crime. Whether or not you personally agree with the policy of using such methods is not an issue. Were it not for the use of such methods, many crimes would go undetected and unprosecuted.

Adapted from the Court's charge in
United States v. Braver, 450 F.2d 799,
805n. 13 (2d Cir. 1971).

REQUEST NO. 7 (Continued)

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Entrapment (If Applicable)

The question of entrapment involves two issues and should be considered by you in two stages. The first issue is whether the defendants were led or induced to commit the crimes by anyone acting for the Government. That is, did the government agents initiate the criminal transaction or, on the other hand, did they merely provide a favorable opportunity for the commission of the crime by the defendant? I instruct you that the defendants must adduce some evidence that a government agent initiated the illegal conduct as opposed to merely providing them with a timely or convenient opening for their own criminal conduct. If you do not find such inducement, then there can be no entrapment regardless of the defendant's state of mind.

Even if you find such inducement, then you must consider the second issue, that is, did the government prove beyond a reasonable doubt that the inducement was not the cause of the crime but that the defendants were ready and willing to commit the crime and were but awaiting an opportunity to act. This is sometimes expressed as propensity to commit the crime.

Entrapment (If Applicable)

Adapted from the Court's charge in
United States v. Berger, 433 F.2d
680, 684 (2d Cir. 1970), cert. denied,
401 U.S. 962 (1971); United States
v. Braver, 450 F.2d 799, 804-05
(2d Cir. 1971):

In other words, if a person has a readiness and willingness to break the law, the mere fact that a government agent provides a favorable opportunity is no defense. If the government has satisfied you beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged, then you may find that the inducement, if any, which brought about the actual offense was no more than the providing of what appeared to the defendant to be a favorable or timely or convenient opening or facility for the criminal conduct in which the defendants were willing to engage. Simply put, were the defendants ready and willing to commit the crimes whenever they had a good opportunity, so that all the government had to do was suggest it? In such circumstances, you may find that the government's agent has not seduced an innocent person but has only provided the means or opportunity for the defendants to effectuate or realize their own then existing purpose.

HCB:bmj
M-979

REQUEST NO. 7 (Continued)

-4-

Entrapment (If Applicable)

Defendants propensity to sell narcotics may be established in various ways. For example, it may come through evidence that the defendant went along readily with the suggestion of the government agent. It may also come through evidence of preparations and subsequent acts to commit the crime.

Adapted from the charge of the Honorable William B. Herlands in United States v. Bowe, et al., 65 Cr. 189; United States v. Croob, 451 F.2d 1284 (2d Cir. 1971). United States v. Charles Harary, 70 Cr. 1104 (May 20, 1971).



Certificate of Service

January 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Richard A. Greenberg